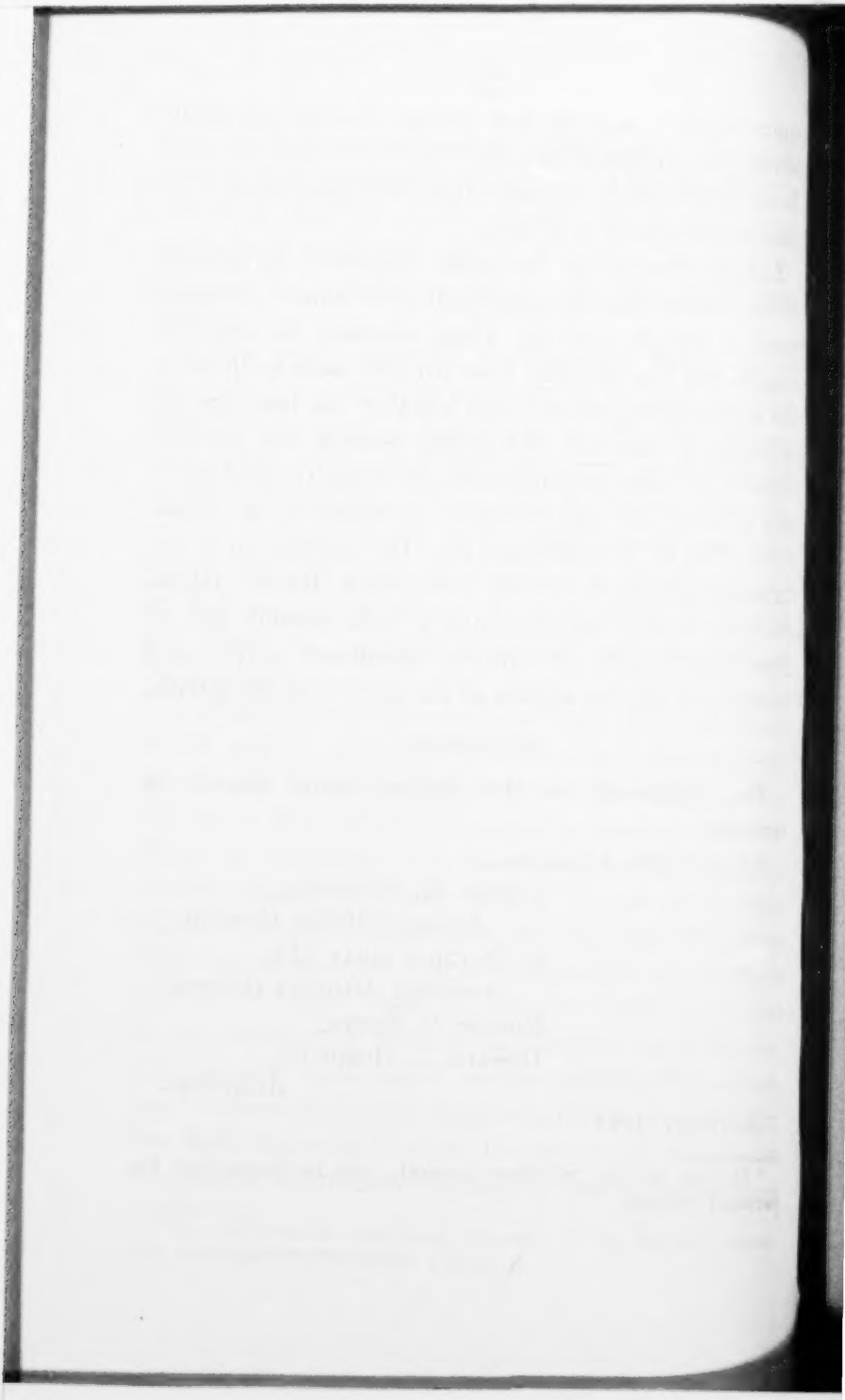

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, ET AL., *Appellants*,

v.

JOAN DICENSO, ET AL., *Appellees*.

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants*,

v.

JOAN DICENSO, ET AL., *Appellees*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

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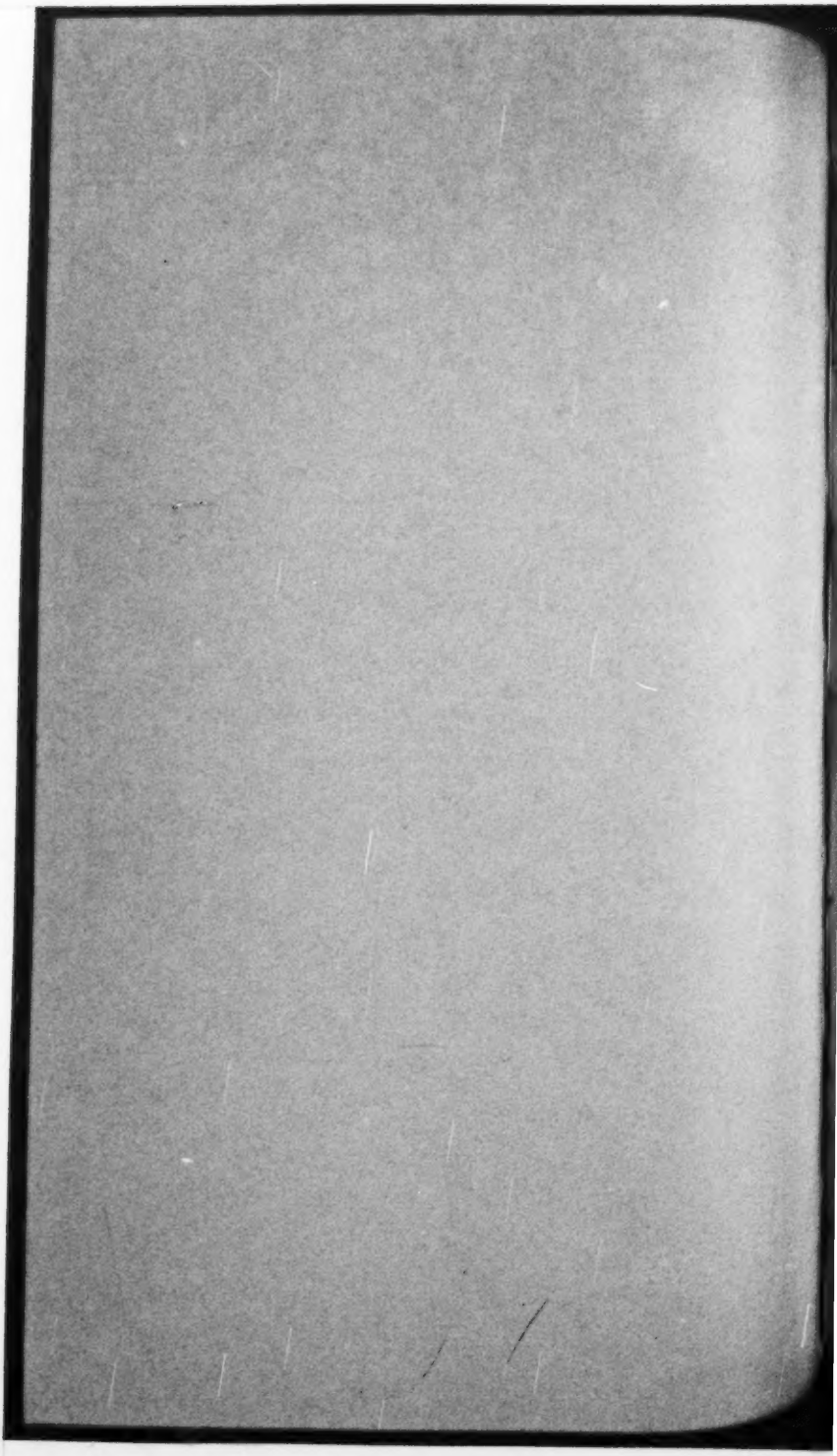

IN THE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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1. The National Catholic Educational Association, the National Association of Episcopal Schools, the Lutheran Education Association, the National Union of Christian Schools and the National Conference of Yeshiva Principals, *amici curiae* herein, are national, nonprofit educational organizations. The schools which the *amici* represent, though church-related, comply with the educational requirements of the states in which they are located. More than 45,000 children attend nonpublic elementary schools in Rhode Island, and those children constitute over 25% of the total school population at this age level.

2. Pursuant to Rule 42(3) of the Rules of this Court, consent to the filing of this brief was requested of the parties to both of these cases by letter of December 14, 1970. All the parties to both cases have consented to the filing of this *amicus* brief except the appellee.

3. The appellants in these cases are the State officials responsible for implementing the challenged statute, several teachers who are the recipients of salary supplement payments, and two parents whose children attend schools which derive benefits from the Salary Supplement Act. None of the parties represent directly the interests of those nonpublic schools which derive tangible benefits from the Salary Supplement Act or similar legislation in force in other states. The Salary Supplement Act has as its avowed purpose the improvement of the quality of secular education in Rhode Island's nonpublic schools, an interest which the schools represented by the *amici* share and seek to implement along with the State of Rhode Island. *Cf. Cochran* v. *Louisiana,* 281 U.S. 370 (1930). This brief is submitted so that the views of those schools may be heard on the important constitutional issues presented in this litigation.

4. The constitutional contentions asserted in these cases affect the *amici* who represent more than 10,000 church-related schools throughout the country wherein approximately 5½ million children are currently receiving a complete secular education in addition to certain aspects of religious instruction. The maintenance of quality education in these schools, in a period of spiraling educational costs, requires some financial assistance from the state for secular programs.

5. The *amici* strongly believe that the educational system of this country should be pluralistic in nature and should be flexible enough to accommodate educa-

tional institutions which are church-related. The *amici* currently fear that the impact of the spiraling costs of education threaten the very existence of a meaningful system of educational pluralism. The *amici* further believe that it is equitable and appropriate for state revenues to be used to assist the secular aspects of church-related schools so that American children of all faiths will be afforded similar educational opportunities and will thereby contribute to the development and growth of the United States.

6. The principal constitutional argument made in this brief has not, to the best of our knowledge, been made in the briefs of any of the parties. Specifically it is contended that the entanglement criterion in the case of *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664 (1970), may be more readily viewed as an element for judging non-secular statutes under the Establishment Clause whose purpose and effect is to favor or accommodate religion.

CONCLUSION

For the foregoing reasons the Motion for Leave to file the attached brief *amicus* should be granted.

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BRIEF FOR

THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, THE NATIONAL ASSOCIATION OF EPISCOPAL SCHOOLS, THE NATIONAL UNION OF CHRISTIAN SCHOOLS, THE NATIONAL CONFERENCE OF YESHIVA PRINCIPALS, AND THE LUTHERAN EDUCATION ASSOCIATION, AMICI CURIAE

INTERESTS OF THE AMICI CURIAE AND THEIR POSITION ON THE ISSUES

A. *Identification of the Amici.* The five *amici curiae* in whose behalf this brief is submitted are nonprofit educational associations. They represent some 6,000,000 children enrolled in more than 14,000 schools which are

served by nearly 250,000 teachers and staff. All five associations are dedicated to fostering and protecting the principals and ideals of American education, improving the quality of that education and preserving its accessibility to and influence on the youth of the Nation.

The National Catholic Educational Association (NCEA) is a voluntary organization founded in 1904. It is the oldest and largest professional organization of Catholic educators in the United States. NCEA serves 5,500,000 students, 206,000 educators and over 14,000 institutions, at all levels and in all areas of Catholic education. NCEA is governed by a Board of Directors, six of the members of which are elected by a Body of Delegates, composed of 15 representatives of each of the six existing departments of NCEA. The Delegates also elect the officers of the organization. Nine members of the Board of Directors are elected by the two present divisions of NCEA, that of Higher Education and that of Fundamental Education.

The National Association of Episcopal Schools is a nonprofit organization chartered in the State of New York. Membership in the Association is voluntary. Member schools are Episcopal schools owned or operated by, or under the jurisdiction of, a cathedral, dioceses, religious community or other recognized Episcopal organizations. Associate membership may be granted to schools which are not church-related but sympathetic to the aims and purposes of the Association.

The National Union of Christian Schools (NUCS) is a nonprofit educational association chartered in Michigan. It has been in existence for more than half

a century. Almost 300 schools located in 26 states, as well as in Canada and Mexico, are affiliated with NUCS. Forty-two of the schools are high schools. Over 60,000 pupils attend schools affiliated with NUCS, and the total number of teachers and administrators on the staffs of these schools exceeds 2,700. Schools affiliated with NUCS are owned by associations of parents. They are operated on the principle that the parents have a primary responsibility for the education of their children.

The National Conference of Yeshiva Principals is the only national professional organization of principals of Yeshiva Hebrew day schools in the United States. The Conference is made up of the principals of 405 schools in 165 communities located in 30 states. These schools have an enrollment of some 80,000 students. The Conference is governed by a Board of Directors consisting of 18 members who are elected biannually at the national convention of the Conference.

The Lutheran Education Association (LEA), a voluntary organization, was founded 27 years ago to support Christian education and to serve the Christian educator. LEA is the only professional organization for educators in the Lutheran elementary and secondary schools. LEA serves 174,931 students, 1,271 institutions, and 7,704 educators in 43 states. The active membership of LEA numbers 2,714 and is composed of ministers of education, pastors and laymen. The Association is governed by nine board members, seven of these are elected by the total membership and two are on the board as representatives of specialized departments—directors of Christian education and principals of Lutheran elementary schools.

B. *The Concern of the Amici and Their Position on the Issues Raised.* The *amici* are aware that it is their association with religious organizations which lies at the heart of appellee's challenge to the eligibility of nonpublic school teachers to participate in the program of salary supplements provided under Rhode Island General Laws, Sec. 16-51-1. This is of special concern to the *amici* for the salary supplement law was designed to promote quality education in the nonpublic schools of the State which comprise about 25% of the total school population at the elementary level.

In developing their constitutional arguments, the *amici* see no need to belabor two fundamental and extremely relevant propositions of ultimate fact made by the appellants in this case and previously accepted and applied by the Court, most recently in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). These are: (1) that religious-related schools of the type for whom these *amici* speak "play a significant and valuable role in raising national levels of knowledge, competence and experience"; and (2) that such "schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 247.

It is to the relief of the pressing problem of preserving the quality secular educational services the private schools carry on that the legislatures of a number of states, including Rhode Island, have recently addressed themselves. Various statutory programs have been proposed, and some enacted, for the purpose of assisting nonpublic secular education, including the nonpublic secular education offered at the religious-related school. These programs are aimed at preserving and improving secular education, not at aiding churches or establishing religions. This case involves the constitutionality of one such program, that adopted by Rhode Island. There, limited assistance to nonpublic

secular education is provided through payment of salary supplements by the state to qualified nonpublic school teachers engaged in solely secular educational functions.

It is the position of these *amici* that: (1) the extension of salary supplements to those engaged in teaching secular subjects in nonpublic schools stimulates quality education in these schools; (2) the Rhode Island statute represents an effective and constitutional coordination of parental and State rights and interests; (3) the statutory program of moderate salary supplements does not in any way compromise the independence of church-related schools nor involve them in an unconstitutional relationship with the State; and (4) the purpose and primary effect of the legislation is the assisting of secular activities, not religious activities; and the Act does not involve any "excessive governmental entanglement" in religion or religious activities.

INTRODUCTORY STATEMENT

Appellants in this case have filed a lengthy and comprehensive brief, fully and carefully considering the relevant factual and legal issues involved and persuasively addressing the arguments advanced by appellees and by the court below. It is not the intention of this *amicus* brief to reiterate that presentation. Rather, our principal purpose is to examine the doctrinal implications of this Court's recent opinion in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), as they relate (1) to the Establishment Clause "test" fashioned by the Court in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963), reaffirmed in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and (2) to the specific subject of state financial assistance to church-related schools now before the Court.

SUMMARY OF ARGUMENT

I. The lower court's reading of the *Walz* "excessive government entanglement" criterion as superseding the *Schempp-Allen* test is erroneous.

II. Appellants' interpretation of the *Walz* criterion as amplifying the *Schempp-Allen* test in respect to statutes with a secular purpose and effect is persuasive, and appellants' demonstration that the statute before the Court satisfies the *Schempp-Allen* test as enlarged by *Walz* is conclusive.

III. The *Walz* criterion may be more readily viewed as a newly formulated element for judging nonsecular statutes under the Establishment Clause whose purpose and effect is to favor or accommodate religion.

IV. Adequate state administrative controls are ordinarily a constitutional requirement under the Establishment Clause in connection with government programs that provide financial aid to the secular functions of church-related institutions.

ARGUMENT

I.

The court below construed language in the *Walz* opinion as significantly modifying and effectively superseding the clearly stated *Schempp-Allen* test. It is true that the *Walz* opinion did not specifically set forth the exact language of this carefully developed test "for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits." (*Allen*, 392 U.S. at 243.) But it is manifestly unthinkable and wholly unreasonable to believe that *Walz* implicitly repudiated this broad standard that the Court had

evolved over a score of years for reviewing Establishment Clause issues.

"The [*Schempp-Allen* test is] as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (374 U.S. at 222; 392 U.S. at 243.)

In *Walz*, the Court further stated: "We must *also* be sure that the end result—the effect—is not an excessive government entanglement with religion." (397 U.S. at 674; emphasis added.)

II.

Appellants' Brief (No. 569, pp. 27-38) forcefully establishes that the purpose and primary effect of the Rhode Island Salary Supplement Act fully satisfies each requisite of the *Schempp-Allen* test.[1] In doing

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[1] Note might here be taken of the lower court's fear, in invalidating the Rhode Island statute, that upholding it "could pave the way for almost total subsidy" of the secular education provided by church-related schools. (316 F.Supp. at 120.) Several objections must be made to this "foot in the door" or "nose of the camel in the tent" contention. (See *Walz*, 397 U.S. at 678.) The most obvious is that the Court should consider only the case presently before it. Even if this Court were to believe that Establishment Clause problems might be posed by some future, hypothetical, more extensive state financial assistance program—despite the fact that the program had a secular purpose and primary effect—the proper time for the Court to address that problem would be when it arises. As the Court said in *Walz*, in respect to arguments of this sort, "any move which realistically 'establishes' a church or

so, appellants view the *Walz* statement as amplifying the meaning of the *Schempp-Allen* standard—necessitating inquiry as to whether a statute, which has a "secular legislative purpose and a primary effect" that does not "advance" religion, may, nonetheless, have "a primary effect that . . . . *inhibits* religion" if the statute engenders "an excessive government entanglement" with the religious institution that is the beneficiary of the state's secular program.

As will be demonstrated in the following paragraph, *if* the *Walz* statement was meant by the Court to be engrafted upon the *Schempp-Allen* test for reviewing statutes such as Rhode Island's that have a secular purpose, then appellants' interpretation is not merely a persuasive reading of the doctrinal development. It is the only logical or sensible reading. Any other reading of *Walz,* in respect to a statute such as Rhode Island's that has a secular purpose, would result in a distortion or repudiation of the *Schempp-Allen* test. This was essentially the course taken by the court below.

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tends to do so can be dealt with 'while this Court sits.'" (397 U.S. at 678.)

However, because of the lower court's expressed apprehension, it is appropriate to comment on the unlikelihood, in view of political reality and the current severe demands being made on the public fisc from all sources, of a state providing anything even approaching full support for the secular educational functions of nonpublic schools. Certainly this Court should not permit unrealistic hypothetical possibilities to thwart Rhode Island's legitimate secular efforts "to provide a quality education for all Rhode Island youth." (R.I. Gen. Laws § 16-7-15.) As has been shown in Appellants' Brief and will be shown herein, the Salary Supplement Act threatens no values protected by the Establishment Clause. Rather, it both furthers the pluralistic aims of our society and facilitates the religious liberty of children whose faith either requires or encourages attendance at schools that provide religious instruction in addition to secular training.

If the Salary Supplement Act has a secular purpose—and such was the unanimous conclusion of the court below—"excessive government entanglement with religion" may bear only on whether the statute *inhibits* the religious liberty of the institutions which benefit from it. As a matter of logic, linguistics and common sense, any government relationships with religious organizations, in respect to administration of such a statute, that may be viewed as "entanglement" or "involvement," cannot *advance* religion. They may only *inhibit* religion.

Walz explicitly recognized this in saying that "the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools" may threaten "the autonomy and freedom of religious bodies." (397 U.S. at 672.) The court below noted the possibility that certain involvements might "represent a substantial limitation on the freedom of parochial schools to set their own curriculum." (316 F. Supp. at 121.) Indeed, *excessive* or *unreasonable* state involvement with church-related schools, with or without public financial assistance, could also be found to violate the Free Exercise Clause. *Cf. Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). This issue of infringement of religious liberty would most quickly surface if the state sought to control or supervise the *religious* aspects of education in church-related schools. Observe the Court's caution in *Allen* against "unconstitutional involvement of the State with religious instruction" (392 U.S. at 248), and the Court's dictate in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), that the state may not "condition the availability of benefits upon . . . [the recipient's] willingness to violate a cardinal principle of . . . religious faith." (374 U.S. at 406.)

But this issue of *inhibition* of religious liberty is nowhere present in this case because it has never been raised by the only persons—the church-related schools which benefit from the enactment—whose rights and interests may be affected as a consequence. These church-related schools have not contended that the Salary Supplement Act unduly interferes with their religious liberty or autonomy because, as Appellants' Brief (No. 569, pp. 52-60) saliently shows, the Act does not inhibit religion through either excessive or impermissible government entanglement or involvement. Nor has this occurred under the much longer federal experience of providing financial assistance to all levels of church-related education with continued administrative supervision.

III.

But, apart from appellants' reasoned interpretation, the Court's statement in *Walz* may be seen from a somewhat different perspective. The *Walz* "excessive government entanglement" criterion may be viewed in the context of the specific type of Establishment Clause problem before the Court in *Walz, i.e.,* a statute that did *not* have a "secular legislative purpose." Having earlier acknowledged that the *Schempp-Allen* test "is not easy to apply" (392 U.S. at 243), the *Walz* statement may more readily be interpreted as newly formulating an important standard for judging statutes under the Establishment Clause whose purpose and primary effect is to favor or accommodate religion.

A. Several of the important Establishment Clause cases previously decided by this Court involved state statutes—like the statute now before this Court, as clearly admitted by the court below (316 F. Supp. at

118, 119)—that had both a secular legislative purpose and a primary effect that was secular—*Everson* v. *Board of Education,* 330 U.S. 1 (1947); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Board of Education* v. *Allen.* In both *Everson* and *Allen,* the statutes—like the statute now before the Court—provided financial assistance to *secular* functions of church-related schools. The statutes, because of their *secular* purpose and effect, were held not violative of the Establishment Clause. As the Court noted in *Walz,* "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in *religious* activity." (397 U.S. at 668; emphasis added.) The statutes in *Everson* and *Allen* were upheld due to their secular purpose and effect even though they afforded substantial incidental "aid" to religion "to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." (*Walz,* 397 U.S. at 671; see also *Everson,* 330 U.S. at 17; *Allen,* 392 U.S. at 242, 244.) As the Court noted in *Walz,* "supplying of costly teaching materials [and bus transportation] was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment." (397 U.S. at 672.) For, as Mr. Justice Frankfurter, joined by Mr. Justice Harlan, said in *McGowan* (366 U.S. at 468)—and as reiterated last Term by Mr. Justice White, joined by The Chief Justice and Mr. Justice Stewart, in *Welsh* v. *United States,* 398 U.S. 333, 369 (1970)—"an establishment contention 'can prevail only if the absence of *any* substantial legislative purpose other than a religious one is made to appear. . . .' " (Emphasis added.)

B. The statute in *Walz* granted "property tax exemptions to religious organizations for religious properties used solely for religious worship." (397 U.S. 666.) Unlike the statutes discussed above and the statute involved in this case, this tax exemption did *not* have a *secular* purpose and effect. The Court specifically found it "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform." (397 U.S. at 674.)[2] The Court explicitly recognized that the state had adopted "an affirmative policy" of favoring "all houses of religious worship" among other entities due to their "beneficial and stabilizing influence in community life." (397 U.S. at 673.) But, even though the property tax exemption had no secular legislative purpose or effect, it was held not to violate the Establishment Clause because its purpose was "neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." (397 U.S. at 672.) Rather, its *purpose* was to accommodate or favor religious exercise and it withstood Establishment Clause attack because its *effect* did not pose those dangers to religious liberty generally—sponsorship or support of, or excessive government entanglement with, religion—that the First Amendment was meant to prevent.[3]

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[2] To uphold the statute, Mr. Justice Brennan, in a separate concurring opinion, *did* specifically rely on this factor as one of "two basic secular purposes for granting real property tax exemptions to religious organizations." (397 U.S. at 687-689.) Discussion of Mr. Justice Brennan's other "secular purpose" is found in footnote 3 *infra*.

[3] Mr. Justice Brennan found that tax exemptions to religious organizations serve a second "secular" purpose because religious institutions "contribute to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." (397 U.S. at 689.) But he was clearly conscious of his unusual use of

C. The *Walz* decision is consistent with a long-standing, although perhaps not expansively articulated, position of the Court that government action which favors or accommodates religious interests is not necessarily violative of the Establishment Clause even though it has no secular purpose or effect. Indeed, such action by government may be required in certain instances to avoid a violation of the Free Exercise Clause. For the "neutrality" imposed by the Religion Clauses of the First Amendment "is not self-defining." *Welsh* v. *United States,* 398 U.S. at 372 (1970) (opinion of Mr. Justice White).

Mr. Justice Goldberg, joined by Mr. Justice Harlan, stated this view in *Schempp:* "But untutored devotion to the concept of neutrality can lead to invocation or

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the word "secular" in characterizing this second purpose: "It is true that each church contributes to the pluralism of our society through its *purely religious* activities, but the state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." (397 U.S. at 693; emphasis added.) Such a "secular" purpose is of a wholly different quality from the secular purpose in *Everson, Allen* and the statute now before the Court. See Note, 84 Harv. L. Rev. 128-129 (1970). To characterize such a purpose as "secular" is simply to conclude that a statute whose purpose is to favor or accommodate religious activities need not violate the Establishment Clause if its effect poses no dangers to those values underlying the Religion Clauses of the First Amendment. In a similar vein, statutes exempting persons with particular religious beliefs from general civil regulations in order not to violate the free exercise of their religion, which clearly have the purpose of "accommodating" or "encouraging" or "aiding" religion, may be characterized as having a "secular" or "nonreligious" purpose; such a characterization is simply a statement of the conclusion that such state action is required by the Free Exercise Clause and not prohibited by the Establishment Clause. See Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 Minn. L. Rev. 329, 395-396 n. 436, 400-402 (1963).

approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. . . . The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact." (374 U.S. at 306, 308.)

Mr. Justice Brennan also adverted to this in *Schempp:* "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment." (374 U.S. at 296.)

And, in *Walz,* the opinion spoke in prominent and unmistakable language: "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . . The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . . The limits of permissible state accommodation to religion are by

no means coextensive with the noninterference mandated by the Free Exercise Clause." (397 U.S. at 668-669, 672; see also 397 U.S. at 676-677.)

D. The essence of the doctrinal development is that nonsecular government action that does not produce sponsorship of religion may favor or accommodate religion if (a) not to do so would violate the Free Exercise Clause, or (b) to do so would either avoid a serious Free Exercise problem or would facilitate religious liberty rather than endanger it by unduly entangling or excessively involving government with religion. It is this last aspect of the doctrinal development of the Establishment Clause that the *Walz* "excessive government entanglement" criterion may most easily be seen as codifying. It represents the Court's most recent effort to amplify its interpretation of the Religion Clauses so as not to construe them "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." (397 U.S. at 671.)

E. As has been shown above, the property tax exemption statute in *Walz* involved nonsecular government action. The Court found that the statute met the above-stated criteria. Although "granting tax exemptions to churches necessarily operates to afford an indirect economic benefit" (397 U.S. at 674), "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." (397 U.S. at 675.) It avoids serious Free Exercise problems because "grants of exemption historically reflect the concern . . . as to the latent dangers inherent in the imposition of property taxes." (397 U.S. at 673.) It helps "guarantee the free exercise of all forms of religious beliefs" (397 U.S. at 678)

and does not produce "excessive government entanglement" because "elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." (397 U.S. at 674.)

F. Some further specific illustrations beyond the statute in *Walz* may be helpful in viewing the *Walz* amplification of Establishment Clause doctrinal development in respect to nonsecular government action—in contrast to statutes with a secular purpose and effect as in *Everson* and *Allen* and the Rhode Island Salary Supplement Act now before the Court.

1. Judicial decisions, holding that the Free Exercise Clause requires special exemption from general civil regulations for persons whose religious beliefs are burdened by the regulations, are examples of nonsecular government action—action that favors or accommodates religion. See, *e.g., Sherbert* v. *Verner,* 374 U.S. 398 (1963). Such action, of course, does not violate the Establishment Clause because of the accommodation between it and the Free Exercise Clause mandated in interpretation of the First Amendment. But, more importantly for purposes of this discussion, in rendering such decisions, the Court has been careful to point out that the nonsecular government action that it is ordering "does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." (374 U.S. at 409.) It is in contexts such as these—*not* in the context of government action that has a secular purpose and effect—that the *Walz* "entanglement" criterion is germane.

2. Government may act to favor or accommodate religion by voluntarily exempting religious persons or institutions from general civil burdens. The statute in *Walz,* as has been shown above, was an example of such nonsecular government action that was held not to violate the Establishment Clause because it did not result in impermissible state involvement or entanglement with religion. See also, *Welsh* v. *United States,* 398 U.S. 333 (1970); *Arlans Dep't Store* v. *Kentucky,* 371 U.S. 218 (1962).

3. Government may engage in nonsecular action to favor or accommodate religion by the enactment of certain affirmative programs. One such program—"off-premises released time"—was held not to violate the Establishment Clause in *Zorach* v. *Clauson,* 343 U.S. 306 (1952), because the Court found "no evidence in the record" (343 U.S. at 311) that the program endangered religious liberty. The state was found only to be "cooperat[ing] with religious authorities" (343 U.S. at 314) and "accommodat[ing] the religious needs of the people." (343 U.S. at 315.) In contrast, several other nonsecular public school programs have been held violative of the Establishment Clause because they did present dangers to religious liberty due to excessive government entanglement and impermissible government involvement with religious instruction and sectarian practices. *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) (on-premises released time); *Engel* v. *Vitale,* 370 U.S. 421 (1962) (Regents' prayer); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) (Bible reading and Lord's Prayer). These latter nonsecular programs involved "the operation of the state's compulsory education system . . . integrated with the program of religious instruction"

(*McCollum,* 333 U.S. at 209); "brought government and religion into that proximity which the Establishment Clause forbids" (Brennan, J., distinguishing *McCollum* from *Zorach* in *Schempp,* 374 U.S. at 263); placed "the power, prestige and financial support of government . . . behind a particular religious belief" (*Engel,* 370 U.S. at 431); "involve[d] the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude" (Goldberg, J., joined by Harlan, J., in *Schempp,* 374 U.S. at 307). The important teaching of the *Walz* criterion is that such effects of nonsecular government action cross the First Amendment line that divides permissible neutrality and accommodation from impermissible sponsorship and entanglement.

4. Government may also engage in nonsecular action to favor and accommodate religion by affording financial benefits. This form of *nonsecular* government action is, of course, highly suspect under the Establishment Clause. Note Mr. Justice Brennan's statement in *Walz:* "General subsidies of *religious* activities would, of course, constitute impermissible state involvement with religion." (397 U.S. at 690; emphasis added.) But, as *Walz* makes clear, in certain instances, even "economic benefit" (397 U.S. at 674) to churches or to religion will not violate the Establishment Clause if not accompanied by "excessive government entanglement." *Sherbert* v. *Verner,* 374 U.S. 398 (1963)—commanding the payment of tax funds in the form of unemployment compensation benefits to a person who would not otherwise receive them except for her religious scruples—further illustrates the proposition that, absent impermissible "involvement of religious with

secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409), certain limited nonsecular government financial aid to religion may be afforded.

G. It is in *this* context that the *Walz* dictum—that "a direct money subsidy would be a relationship pregnant with involement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards" (397 U.S. at 675)—must be understood. *Walz* was concerned with *nonsecular* financial benefit to religion. "Sustained and detailed administrative relationships" in *this* context would involve and entangle the state with the *religious* activities of churches. Unlike the absence of undue involvement in *Walz* and *Sherbert,* such government action would strike at the core of values underlying the Religion Clauses of the First Amendment. To transpose this *Walz* dictum into the context of a government program that has a *secular* purpose and effect would be "placing too much weight on a few words or phrases of the Court" (397 U.S. at 670); it would be attributing to the Court "too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." (397 U.S. at 668.)

IV.

A. The fact is that a certain quantum of state supervision and control is a constitutional requisite in respect to a secular state program of providing financial assistance to church-related schools. Rather than being a vice, it is a virtue ordinarily commanded by the Establishment Clause to assure that the primary effect of

such a program is the expenditure of public funds for secular—and not religious—education.

If there is any clear principle to be deduced from the course of Establishment Clause adjudication before this Court—one requiring no further citation—it is that public funds may not be used to support religious exercises, religious activities, religious functions, or religious instruction in *any* school—public, private, or church-related. If public funds were granted to church-related schools for the purpose of financing secular education therein and adequate administrative controls did not exist to insure that the public funds were not spent for religious purposes, it would present a real risk that public funds would be used to sponsor religion in violation of the Establishment Clause.

It may well be that Rhode Island's payment of only 15% of the salaries of nonpublic school teachers, who teach only subjects required by state law or actually taught in the public schools, so clearly and presumptively has the secular effect intended by the Salary Supplement Act that no state administrative controls are constitutionally necessary. But it would be high irony, poor public policy and infirm constitutional doctrine to invalidate the Rhode Island statute because the state sought more fully to insure that public funds would not be expended for religious purposes. Indeed, it would be subversive of basic Establishment Clause values for this Court to hold that public funds may be provided for church-related institutions—be they schools, hospitals, or homes for the elderly—only if they are not accompanied by those administrative enforcement mechanisms that secure a secular effect.

B. In invalidating the Rhode Island statute, the court below mentioned an administrative relationship

that it found most troubling—the possibility that state officials would "monitor parochial school expenditures and in close cases determine which spending is 'religious' and which 'secular.' " (396 F. Supp. at 121.) Appellants' Brief (No. 569, pp. 55-58) painstakingly demonstrates that the lower court's concern finds no support in the record in this case. But even if such administrative controls were present, their impact would be to preserve Establishment Clause values rather than undermine them.

If state officials sought to *forbid* certain religious instruction in a church-related school, or *even if* state officials sought to *require* certain secular instruction in a church-related school that conflicted with the religious dictates of the church under whose auspices the school was operated, *then* such administrative requirements might result in an inhibition of religion barred by the First Amendment. But state regulations similar to the lower court's illustration would seek only to assure that public funds are not being used to support religious instruction. They would in no way require that anything be taught or not be taught. They would only determine what may or may not be underwritten with public money.[4] Such state involvement—in no

[4] Under the lower court's illustration, a state official might determine that a particular course in a church-related school does not qualify as secular eduction for purposes of the Salary Supplement Act. It should be noted that such an inquiry by public officials (or courts) is addressed to what is or is not "secular". It in no way involves civil officials (or courts) in "controversies over *religious* doctrine and practice" or requires them "to resolve *ecclesiastical* questions" contrary to this Court's decision in *Presbyterian Church* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 (1969) (emphasis added). It "does not entail judicial [or administrative] inquiry into dogma or belief." (Harlan, J., concurring in *Walz*, 397 U.S. at 698 n. 1.) It requires a civil determination for *state* purposes, *not* a civil intervention into church matters with ecclesiastical consequences.

way interfering with religious liberty but insuring a primary effect of public funding that does not advance religion—should not be held to invalidate a state program of financial assistance to church-related schools that has a secular purpose and that also both facilitates the religious exercise of those whose conscience calls for attendance at such schools and advances pluralistic values in our society.

C. 1. This Court has explicitly affirmed the constitutional relevance, legitimacy and necessity of such administrative and judicial oversight when public financial assistance is given to church-related schools. In *Allen*, the Court upheld the state's lending of secular textbooks to parochial school students *because* "each book loaned must be approved by the public school authorities; only secular books may receive approval. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." (392 U.S. at 244-245.) The Court clearly invited proof as to whether the state-provided textbooks were "used by the parochial schools to teach religion" and refused to invalidate the state program *because* "no evidence has been offered about particular schools, particular courses, particular teachers, or particular books." (392 U.S. at 248.) Surely a state's effort to insure a primary secular effect does not call for invalidation of the state's secular program.

2. Wholly apart from a program of state financial assistance to church-related schools, this Court has specifically approved of administrative regulation—with judicial review—of church-related schools, attendance at which satisfies the state's compulsory education requirements. When a state so accredits a nonpublic

school, private or church-related—as it must under *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)—it is obliged to render certain that the accredited nonpublic school "meets the secular educational requirements" (*Everson,* 330 U.S. at 18); "if the state must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function." (*Allen,* 392 U.S. at 247.) Indeed, it might well be that for the state to place its imprimatur on church-related schools through accreditation without insuring that basic state secular educational requirements are fulfilled would itself be a violation of the Establishment Clause.

Pierce acknowledged state authority "reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." (268 U.S. at 534.) *Allen* "confirmed the power of the States to insist" that such schools "provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction." (392 U.S. at 245-246.) *Allen* further noted the "*wide range* of private school regulation" and observed approvingly that New York "regulates private schools *extensively,* especially as to attendance and *curriculum*" and requires "that the instruction given in private schools satisfying the compulsory attedance law be 'at least *substantially equivalent* to the instruction . . .'" in public schools. (392 U.S. at 246 n. 7; emphasis added.) Materials presently before this Court further illustrate the broad range of state regulation requiring state

evaluation and approval of nonpublic schools in Rhode Island (Appellants' Brief, No. 569, pp. 58-59 and Appendix) and in Pennsylvania (Brief for Appellee Schools in *Lemon* v. *Kurtzman*, No. 89, October Term, 1970, Supplement C) that has long predated any state financial assistance to them.

The fact is that the state administrative inquiries required pursuant to these accreditation regulations are the *identical* type of administrative inquiries that would be made—and that the Court in *Allen* has urged *should be* made—to assure that public funds are not used to sponsor religious instruction in church-related schools. Such state involvements with church-related institutions inevitably arise whenever religious organizations undertake secular programs—with or without public funds—parallel to those carried on by government. When church-related bodies perform these secular functions, the state has a vital interest in seeing to it that they are carried on within the state's view of proper limits. This is clearly not the "excessive government entanglement" proscribed by *Walz*.[5]

[5] The court below, in dealing with the *Walz* "entanglement" criterion, injected an additional consideration into this case as a basis for invalidating the Rhode Island statute. It believed that "efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy." (316 F.Supp. at 120.) But the *Walz* "excessive government entanglement" statement was clearly not addressed to matters of this kind. *Walz* spoke to impermissible "official and continuing surveillance" of religious matters by government, *i.e.*, of state interference with religion. It did not speak disparagingly of religious groups speaking out and exerting influence in respect to government matters. To the contrary, *Walz* spoke of the "right" of "adherents of particular faiths and individual churches . . . [to] take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions." (397 U.S. at 670.) *Walz* implicitly recognized that to permit tax exemptions for re-

3. This Court has also explicitly recognized the unavoidable administrative and judicial obligation, in areas of Establishment Clause concern, to distinguish between what is secular and what is religious—thus dispelling the lower court's discomfort with "the possibility of legal disputes over the 'secular-religious' distinction." (316 F. Supp. at 121.) In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court found that a state requirement that public officeholders declare a belief in God had a religious, rather than secular, purpose and effect. In *McGowan* v. *Maryland*, the Court expressed its duty to engage in "close scrutiny" to determine if an activity's purpose and "its operative effect" were religious. (366 U.S. at 449, 453.) In *Engel* v. *Vitale*, the Court found that "daily classroom invocation of . . . the Regents' prayer is a religious activity."

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ligious organizations—as well as any other exemptions for religious interests from general civil regulations—might excite political controversy through the effort to actually obtain them.

Permitting public funds to be used for church-related schools might well produce similar results. But this would be no less true in permitting any government assistance to any of the many secular and social welfare functions of religious institutions. Furthermore, a prohibition of public funds to church-related schools would not likely diminish the extent of religious political activity. Those who send their children to church-related schools might intensify opposition to increased government aid to *public* education on the ground that it raises their taxes without direct personal benefit, decreases their financial ability to support the church-related schools, and augments the operational costs of those schools seeking to maintain qualitative parity with the improved public schools. And if the private cost of attendance at church-related schools became prohibitive, religious pressures might be brought to bear on public school authorities to fashion the operation of public schools in a way more congenial to religious precepts. The fact of religious interests advocating their views in respect to political affairs exists; permitting or denying public financial assistance to parallel secular programs carried on by religious institutions neither exacerbates nor diminishes these political efforts.

(370 U.S. at 424.) In that case, the Court also passed judgment on such public school activities as recitation of the Declaration of Independence (or the Gettysburg Address) and the singing of the Star Spangled Banner—all of which have some religious references—and concluded that these exercises were "patriotic or ceremonial" rather than "religious." (370 U.S. at 435 n. 21.) In *Abington School District* v. *Schempp,* the Court affirmed the trial court's finding that Bible reading and recitation of the Lord's Prayer were religious exercises and had no secular purpose (374 U.S. at 222), while stating that study of the Bible and religion "as part of a secular program of education" was permissible. (374 U.S. at 225.)[6] Thus, the courts must and do stand ready to invalidate any public school practice whose purpose and effect is religious rather than secular. Again, this inquiry is *identical* to that made for the purpose of assuring that public funds are not used to sponsor church-related school practices whose purpose and effect is religious rather than secular.

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[6] It should once more be noted that these inquiries are not of the nature proscribed by this Court in the *Presbyterian Church* case. See fn. 4 *supra.*

CONCLUSION

The decision below should be reversed.

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